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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933

No. 477

NOAH BEST, ADMINISTRATOR OF THE ESTATE OF ALBERT EDWARD BEST, DECEASED, PETITIONER,

vs.

DISTRICT OF COLUMBIA, RESPONDENT.

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF ON BEHALF OF PETITIONER.

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INDEX.

	Page
Opinion of the Court Below	1
Jurisdiction	1
Questions Presented	1
Statement of the Case	2
Summary of Argument	4
Argument	4
Conclusion	9

TABLE OF CASES CITED

	Page
Amer. Ry. Exp. Co., *vs.* Crabtree, 271 F. 287	6
Cole *vs.* Penn. R. Co., 43 F. (2) 953	6
Consolidated Lead & Zinc Co., *vs.* Corcoran, 37 F. (2) 296	7
Hornblower *vs.* George Washington University, 31 App. D. C. 71	9
New York, N. H. & H. R. Co., *vs.* Fruchter, 260 U. S. 141	6
So. Pac. Co., *vs.* Marquez, 44 F. (2) 286	8
Union Pac. Ry. Co., *vs.* McDonald, 152 U. S. 262	4
United Zinc Co., *vs.* Britt, 258 U. S. 268	5

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Opinion of the Court Below.

The opinion of the Court below is found at pages 9 to 17 of the Record and 61 Wash. Law Rep. 578.

Jurisdiction.

The jurisdiction of this Court is based upon Sec. 240 (A) of the Judicial Code as amended by the Act of February 13, 1925, c. 229 (43 Stat. 938, 28 U. S. C., Sec. 347). The original date of the judgment of the Court of Appeals is June 30, 1933. (R. 17)

Questions Presented.

The petitioner, Noah Best, as administrator of the estate of his son, Albert Edward Best, filed suit against the respondent, District of Columbia, in the Supreme Court of the District of Columbia. The declaration was based upon the doctrine

of attractive nuisance. After counsel for the petitioner had made his opening statement to the jury, the trial Court, upon motion of counsel for the respondent, directed the jury to return a verdict for the defendant, which was done, and judgement was entered thereon. The Court of Appeals of the District of Columbia affirmed such action of the trial Court and this Court granted a petition for certiorari upon the following questions:

> 1. Upon a given state of facts is a defendant liable for injuries to an infant of five years of age under the doctrine of attractive nuisance?
> 2. Is the doctrine of attractive nuisance now a part of the law of the Federal courts, particularly the courts of the District of Columbia?

Statement of the Case.

The petitioner, Noah Best, filed suit in the Supreme Court of the District of Columbia for the wrongful death of his minor son. The declaration, among other things, alleged that the respondent, District of Columbia, maintained a wharf which was adjacent to a public street, frequented by many people and children; that it was the duty of the municipality (1) to maintain the wharf and its approaches in a manner that might not be peculiarly attractive to children, (2) to maintain barriers to keep out children of tender years, (3) to keep a safe and proper lookout so that children of tender years would not be allured, invited or enticed to come upon the wharf, (4) to keep the wharf in a safe condition. The declaration then alleges a breach of such duties, causing the death of petitioner's intestate, a child of five years, by drowning. (R. 1-3)

The plea of the respondent admitted control and jurisdiction of the place where decedent met his death. The plea did not deny (1) that the intestate was playing on the wharf, (2) that the age of petitioner's intestate was five years, (3) that the intestate was incapable of exercising ordinary care and caution. Under the rules of pleading in the District of Columbia courts, these allegations were deemed admitted. The plea expressly admitted that the wharf was controlled by

the municipality and that it was used for the purpose of storing sand and gravel; it was admitted that the wharf was adjacent to the street. Denial of the other allegations followed, as well as allegations constituting affirmative defenses. (R. 3-5)

After the jury was sworn to try the issues in this case, counsel for petitioner made an opening statement (R. 7-8). This statement set forth that the plaintiff expected to prove that petitioner's intestate was a child of five years of age; that on the date of his death he and other children were playing at a wharf which was operated and controlled by the respondent, the same being located near the place where the boats leave for Norfolk; that the wharf extended over the water and petitioner's intestate fell through one of the many holes therein and was drowned; that the place where the children were, was not fenced off; that it did have some sort of a barrier close to the street* but the side portion of such barrier was down and the children went in and out of that part at their pleasure; that there was no sidewalk upon the street at that point, and the premises of the respondent were immediately adjacent to the street; that the children used the place where petitioner's intestate met his death as a place to play on and play in, and that the respondent maintained such place in a condition that was dangerous to the children thereon and such respondent was to be held responsible for petitioner's intestate having been attracted to the place where he was drowned by reason of the foregoing facts; that this wharf was a place where boats docked and unloaded sand.

After such opening statement was made, counsel for the respondent moved the Court to direct the jury to return a verdict for the respondent, the defendant. Such motion was granted over the exception of the petitioner (R. 8); and such

* The quotation set forth in the bill of exceptions in the Record (R. 7) is an exact copy of the transcript of the stenographer's reports. The punctuation thereof is that of the stenographer. Beginning at the sixth line from the bottom of page 7 of the Record the statement, in order to make sense, should be punctuated as follows:

". . . that it did have some sort of a barrier close to the street—there was no sidewalk—but the side portion was down . . . ."

action of the trial court was assigned as error in the Court of Appeals.

Summary of Argument.

It is the contention of the petitioner that the opening statement to the jury set forth facts constituting a valid cause of action against the respondent under the doctrine of attractive nuisance, and that the doctrine of attractive nuisance is still applicable and still a part of the law of the District of Columbia.

Argument.

The doctrine of attractive nuisance was clearly stated in Union Pac. Ry. Co. *vs.* McDonald, 152 U. S. 262; the court said, p. 279:

> "We adhere to the principles announced in Railroad Co. *vs.* Stout, supra. Applied to the case now before us, they require us to hold that the defendant was guilty of negligence in leaving unguarded the slack pit, made by it in the vicinity of its depot building. It could have forbidden all persons from coming to its coal mine for purposes merely of curiosity and pleasure. But it did not do so. On the contrary, it permitted all, without regard to age, to visit its mine, and witness its operation. It knew that the usual approach to the mine was by a narrow path skirting its slack pit, close to its depot building, at which the people of the village, old and young, would often assemble. It knew that children were in the habit of frequenting that locality and playing around the shaft-house in the immediate vicinity of the slack pit. The slightest regard for the safety of these children would have suggested that they were in danger from being so near a pit, beneath the surface of which was concealed (except when snow, wind or rain prevailed) a mass of burning coals into which a child might accidentally fall and be burned to death. Under all the circumstances, the railroad company ought not to be heard to say that the plaintiff, a mere lad, moved by curiosity to see the mine, in the vicinity of the slack pit, was a trespasser, to whom it owed no duty, or for whose protection it was under no obligation to make provision . . . ."

(p. 280):

> "Referring to the case of Townsend *vs.* Wathen, Judge Thompson in his work on the Law of Negligence, Vol. 1, p. 305 n., well says: 'It would be a barbarous rule of law that would make the owner of land liable for setting a trap thereon, baited with stinking meat, so that his neighbor's dog, attracted by his natural instincts, might run into it and be killed, and which would exempt him from liability for the consequences of leaving exposed and unguarded on his land a dangerous machine, so that his neighbor's child, attracted to it and tempted to intermeddle with it by instincts equally strong, might thereby be killed or maimed for life.' Indeed, the present case is stronger than the one supposed by the writer, in that the defendant was aware of the fact that children often visited its mine."

In United Zinc Co. *vs.* Britt, 258 U. S. 268, the court stated that the reason for the rule there laid down was because there was no evidence (1) that the children could see the attractive nuisance from where they lawfully were; (2) that such sight attracted them to the nuisance. The court said, p. 275:

> "In the case at bar it is at least doubtful whether the water could be seen from any place where the children lawfully were and there is no evidence that it was what led them to enter the land. But that is necessary to start the supposed duty."

At page 276 of the opinion, the court pointed out that the facts failed to show that it was the habit of the children to go to the place of the nuisance. The court said:

> ". . . It does not appear that the children were in the habit of going to the place; so that foundation also fails."

In the opening statement in the case at bar, counsel said that the place of the nuisance was right off of the street, on which there was no sidewalk, and the same was maintained by the District as an attractive nuisance; that the side portion of the barrier at the street was down, and that the

children used the place to play on and went in and out of their pleasure. (R. 9)

All three of the exceptions to the rule laid down in the Britt case were met. That case does not govern the case at bar, because the facts were different from the case at bar.

The present action was based upon two sets of facts (1) showing that the children lawfully in the street could see the attractive nusiance because the barrier thereto was down and the same was maintained by defendant and attracted the children there; and (2) the children were in the habit of playing at that place. (R. 9)

The case of New York, N. H. & H. R. Co. *vs.* Fruchter, 260 U. S. 141, the child was injured by an unguarded electric wire after climbing a pole 29 feet in height in order to reach a pigeon's nest. That case is not in point. The Circuit Court of Appeals for the 2d Circuit so states.

In Cole *vs.* Penn. R. Co. (C. C. A. 2) 43 F. (2) 953, 955, the court stated that the reason for the doctrine announced in the Fruchter Case was:

> ". . . on the ground . . . that the doctrine laid down in the Railroad Co. *vs.* Stout, 17 Wall. 657, and Union Pacific Ry. Co. *vs.* McDonald, 152 U. S. 262, did not cover the facts presented."

In the case of Am. Ry. Exp. Co. *vs.* Crabtree (C. C. A. 6) 271 F. 287, 288, the court held that the question of negligence in an action by an administrator for the death of an infant, which action is based upon the doctrine of attractive nuisance, was a question of negligence which must be submitted to a jury.

In the Britt case, the children were 8 and 11 years old, the nuisance was 100 to 120 feet from where the children were. The children in that case and in the Fruchter case had to seek out the nuisance. The case at bar does not come within those facts.

The majority opinion in the Britt case does not expressly reverse the turntable doctrine. To the contrary the court said, p. 275:

> ". . . But the (turntable) principle if accepted must be cautiously applied."

We must determine whether the Britt and Fruchter cases reverse the Stout case, by implication. Various courts have held that they do not.

In Consolidated Lead and Zinc Co. *vs.* Corcoran (C. C. A. 10) 37 F. (2) 296, an attractive nuisance case, the court reversed the case because of the instructions to the jury, but announced the law of the case to govern the second trial. The nuisance was "near and in plain view of the road" (p. 296), "the children were in the habit of playing about the nuisance" (p. 296). In speaking of the effect of the opinion in the Britt case, the court said, p. 297:

> ". . . That case distinguished Railroad Co. *vs.* Stout, 17 Wall. 657 . . . and Union Pacific Railway *vs.* McDonald, 152 U. S. 262 . . . . Both of those cases are more nearly applicable here. The Britt case was essentially different in the facts, which were held not to impose the duty of care. The court said: 'There can be no general duty on the part of the landowner to keep his land safe for children, or even free from hidden dangers,' but was careful to add, 'if he had not directly or by implication invited or licensed them to come there.' The case (Zinc Co. *vs.* Britt) is obviously not in point."

The court then held that the facts alleged in the declaration were proved and that the motion to direct a verdict for defendant was properly overruled. P. 298 of the opinion:

> "But it is alleged in this case that habitual use as a playground had been made of the premises and transformer house, as the company knew or might easily have known, and in that situation the plaintiff was a licensee, and being there as such, with the acquiescence of the company, it owed him the duty of protection against danger in the transformer house known to the company, to which he might be attracted and to which it might reasonably anticipate he would resort and be injured. (Citing cases) . . .
>
> "The motion to direct a verdict was not well founded, as the evidence fully substantiated the averments of the petition. We note the more prominent facts the evidence proved or tended to prove at the trial."

In So. Pac. Co. *vs.* Marquez (C. C. A. 9) 44 F. (2d) 286, the plaintiff was a boy of 10 years who was injured while playing on an unguarded turntable, which was easily unlocked, and about which children had been in the habit of playing. Judgment was entered for plaintiff and defendant appealed. The case was affirmed. The court pointed out, p. 286:

> ". . . The principal assignment of error is based on the refusal of the court to direct a verdict for the appellant (defendant below) at the close of the evidence."

The court considered the Britt case and the Fruchter case but pointed to the words of Mr. Justice Holmes in the Britt case ("But the turntable principle if accepted must be very cautiously applied.") as meaning that the turntable doctrine as stated in the Stout case was still applicable to proper facts. The court said, p. 287:

> "Counsel for appeallant seems to concede that the issues were properly submitted to the jury under the authority of the Stout and McDonald cases, but earnestly insists that these cases were overruled by the Britt case and by New York, N. H. & H. R. Co. *vs.* Fruchter, 260 U. S. 141, 43 S. Ct. 38, 67 L. Ed. 173. We cannot agree with the latter contention. In the Britt and Fruchter cases the court simply refused to apply the doctrine of the turntable cases to a pond of poisoned water or to electric wires strung twenty-nine feet above the street. The most that can be claimed in that behalf is that the court has declared that the principle involved should be applied with caution, and that the doctrine of the turntable cases should be restricted rather than extended. Further than this the court has never held that a recovery should not be permitted on facts similar to those presented here."

In the case at bar, the child was five years of age; a sand pile, which was to be seen from the street, was unfenced and in a place open to whomsoever chose to enter. The children had been allowed to play about the place. Defendant had permitted them so to do. This was a place where boats docked. Surely, then, it was, as Mr. Justice Holmes said in

the Britt case, "something that was certain to attract" a child of 5 years of age, the very age when he would follow "a bait as mechanically as a fish."

Every fact stated in the opening statement was by the motion conceded as true.

The opinions of the Supreme Court and these Circuit Courts of Appeal are in conflict with the case of Brannon *vs.* Wimsatt, 54 App. D. C. 374, and the opinion in the present case. In the case of Brannon *vs.* Wimsatt, supra, the Court of Appeals of the District of Columbia held that the opinion of the Supreme Court in the Britt case wiped out the doctrine of attractive nuisance and that it was no longer basis for an action for negligence in the courts of the District of Columbia.

In the District of Columbia it is settled law that the trial court has the right to direct a verdict for the defendant upon the opening statement of plaintiff's counsel to the jury. However, as stated in the case of Hornblower *vs.* George Washington University, 31 App. D. C. 64, 71:

> ". . . The trial court, however, should not exercise this power unless it clearly appears from the plaintiff's own statement that he cannot recover. This is a conclusion that trial courts rarely reach, and a rule that should not be applied except in cases where the statement clearly shows that no cause of action exists."

It is settled law that a party making a motion to direct admits that the allegations made against him are true even in their most unfavorable construction.

The allegations in the opening statement made out a case of attractive nuisance under the decisions of the Courts.

Conclusion.

The questions presented should be answered in the affirmative.

Respectfully submitted,

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